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No. 14-571

# In the Supreme Court of the United States

APRIL DEBOER, ET AL., PETITIONERS

v.

RICHARD SNYDER, GOVERNOR, STATE OF MICHIGAN, IN HIS OFFICIAL CAPACITY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

## BRIEF FOR THE RESPONDENTS

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## QUESTION PRESENTED

Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?

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## INTRODUCTION

This case is not about the best marriage definition. It is about the fundamental question regarding *how* our democracy resolves such debates about social policy: Who decides, the people of each state, or the federal judiciary? Because the U.S. Constitution is silent about how to define marriage, the issue remains where it has always been: with the people. When people of good will disagree—and they invariably do—they should engage in compassionate and civil dialogue in the public square. As Justice Holmes observed, our Constitution "is *made* for people of fundamentally differing views." *Lochner* v. *New York*, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting) (emphasis added). The issue of how to define marriage is no exception.

There are certainly many competing views on the nature and purpose of marriage. One view is that marriage is inseparably linked with having children and biological kinship. On this view, marriage is a means for encouraging individuals with the inherent capacity to bear children to enter a union that supports raising children, provides children with the benefit of both a mother and father, and enables children to have a relationship with each biological parent. Another view is that marriage is primarily about commitment, with gender and biological procreation taking less prominent roles. From this perspective, marriage is a commitment that grounds couples and provides familial stability. Importantly, neither view stigmatizes the other; they are simply different conceptions of what the marriage institution should be.

It is "demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds." *Schuette* v. *Coalition to Defend*, 134 S. Ct. 1623, 1637 (2014) (plurality). The Constitution reserves to the states "a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status." *Alden* v. *Maine*, 527 U.S. 706, 714 (1999). Our federal structure allows individuals to exercise that dignity through the ballot box at the state level. That is why the "Constitution foresees the ballot box, not the courts, as the normal instrument for resolving differences and debates"; it is a " 'democratic political system through which the people themselves must together find answers' to disagreements of this kind." *Coalition to Defend*, 134 S. Ct. at 1649–50 (Breyer, J., concurring).

The Sixth Circuit recognized these essential federalism principles, holding that the power to define marriage must be left where "it has been since the founding: [in] the hands of state voters." Pet. App. 29a. That conclusion follows this Court's recent admonition that "the definition and regulation of marriage" has been "treated as being within the authority and realm of the separate States." *United States* v. *Windsor*, 133 S. Ct. 2675, 2689 (2013). It is also consistent with decisions by courts around the world—including the United Nations Human Rights Committee and the European Court of Human Rights—which have concluded that it is the people, not the courts, who have the right to define marriage.

The Fourteenth Amendment does not dictate any particular marriage view, so the courts are not in a position to impose one. Voters have a legitimate interest in promoting their own views, and while not all voters agree, the marriage view adopted since before the country's founding is constitutional.

## STATEMENT OF THE CASE

### A. Competing views of marriage

People have many different understandings of marriage and the role it should play in society. Those who wish to retain the opposite-sex marriage model may believe the government has no legitimate interest in recognizing adult emotional commitments. Their marriage view is biologically based, primarily child-centered, and has a conjugal meaning, with a primary purpose of uniting every child to his or her biological mother and father whenever possible. See, *e.g.*, *Windsor*, 133 S. Ct. at 2718 (Alito, J., dissenting) (describing competing visions). Some who favor redefining marriage believe marriage's primary purpose is to recognize commitment. Because the commitment of a same-sex couple is just as strong and sincere as that of any other, under this view the government's refusal to recognize a same-sex marriage is arbitrary discrimination and unfairly withholds benefits from the couple's children. See *id.*

The difference in these views is not that one side promotes equality, justice, and tolerance while the other endorses inequality, injustice, and intolerance. They are simply different conceptions of what role the institution should play in our society.

### B. The history of marriage in Michigan

Michigan has defined marriage as the union of one man and one woman since before statehood. E.g., 1 *Laws of the Territory of Michigan* at 30–32 (1805 statute using the terms "wife" and "husband" and "man" and "woman"). Early statutes required parties wishing to be married to solemnly declare that they take each other as "husband and wife." Mich. Rev. Stat. 1846, Ch. 83, § 9. In fact, "[t]he law of every common-law state, and indeed of every European and American state, deal[t] with marriage as a voluntary union of a man and a woman." Joseph H. Beale et al., *Marriage and the Domicil*, 44 Harv. L. Rev. 501, 504 (1931). Michigan reaffirmed this and other aspects of marriage in 1996: "Marriage is inherently a unique relationship between a man and a woman." Mich. Comp. Laws § 551.1. "As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting that unique relationship in order to promote, among other goals, the stability and welfare of society and its children." *Id.*

In 2004, one year after Massachusetts' highest court struck down that state's marriage law, nearly 2.7 million Michigan voters placed their statutory marriage definition in their state Constitution. The people recognized that what makes marriage unique is the capacity to create children and inherently expressed that it was their prerogative, not that of the courts, to decide an issue so important to them: "To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose." Mich. Const. art. I, § 25.

### C. The petitioners

April DeBoer and Jayne Rowse are an unmarried, same-sex couple residing in Hazel Park, Michigan. Both are nurses and state-licensed foster parents. Each has adopted children with special medical needs: DeBoer has adopted child R, and Rowse has adopted both N and J. Pet. App. 105a.

### D. District-court proceedings

This case began as a challenge to Michigan's adoption laws. But when the district court concluded that Michigan's adoption laws had not caused any injury, the court "invit[ed] plaintiffs to seek leave to amend their complaint to include a challenge to [Michigan's marriage amendment]." Pet. App. 106a.

After the petitioners amended, the court denied cross-motions for summary judgment. The court recognized both that "[t]he underlying facts are not in dispute" and that under rational-basis review " '[t]he government has no obligation to produce evidence to support the rationality of its . . . [imposed] classifications and may rely entirely on rational speculation unsupported by any evidence or empirical data.' " Pet. App. 34a. Yet the court held that "a triable issue of fact exists regarding whether the alleged rationales for the [marriage laws] serve a legitimate state interest."

The trial lasted nine days. Treating the question of rational basis as hinging on factual disputes that could be resolved at trial, the court concluded that the testimony of every one of the petitioners' expert witnesses was credible, and that every one of Michigan's experts was not. Pet. App. 109a–16a, 116a–23a.

As a result, the district court struck down Michigan's marriage definition. In so doing, the court recognized that it was not possible to make any finding that the voters acted out of animus: "Since the Court is unable [to] discern the intentions of each individual voter who cast their ballot in favor of the measure, it . . . cannot ascribe such motivations to the approximately 2.7 million voters who approved the measure." Pet. App. 133a. But the court said that none of Michigan's suggestions for why voters might have enacted the amendment was rational. Pet. App. 127a.

### E. The Sixth Circuit's decision

The Sixth Circuit reversed. At the outset, the majority recognized that "[t]his is a case about change—and how best to handle it under the United States Constitution." Pet. App. 13a. The court explained that our constitutional structure leaves the question of how to define marriage not to the federal courts but "to the less expedient, but usually reliable, work of the state democratic processes." Pet. App. 16.

Writing for the majority, Judge Sutton first noted that as a lower court he was bound by *Baker* v. *Nelson*, 409 U.S. 810 (1972). Pet. App. 25a–26a. He then examined the question presented through a number of lenses—"originalism; rational basis review; animus; fundamental rights; suspect classifications; evolving meaning"—and concluded that not one of the plaintiffs' theories "makes the case for constitutionalizing the definition of marriage and for removing the issue from the place it has been since the founding: in the hands of state voters." Pet. App. 28a–29a.

Starting with original meaning, the majority reasoned that people who ratified the Fourteenth Amendment would not have understood it "to require the States to change the definition of marriage." Pet. App. 30a. The pathway for change is "the agreed-upon mechanism[ ]"—the amendment process. Pet. App. 29a.

As for rational-basis review, the court recognized that government has an interest in the marriage definition—"not to regulate love," but out of concern for "the intended and unintended effects of male-female intercourse." Pet. App. 32a. As the court noted, at least two rational bases support this legitimate interest.

First, "[b]y creating a status (marriage) and by subsidizing it (e.g., with tax-filing privileges and deductions), the States created an incentive for two people who procreate together to stay together for purposes of rearing offspring." Pet. App. 34a–35a. "That does not convict the States of irrationality, only of awareness of the biological reality that couples of the same sex do not have children the same way as couples of opposite sexes and that couples of the same sex do not run the risk of unintended offspring." Pet. App. 35a.

Second, referencing the 2003 Massachusetts Supreme Court decision that occurred one year before the amendment passed, the court held that it is rational "to wait and see before changing a norm that our society (like all others) has accepted for centuries[,]" as doing so is not simply "preserving tradition for its own sake." Pet. App. 35a.

In accepting these reasons as rational, the majority acknowledged that marriage laws include inconsistencies, but explained that other views of marriage, including the petitioners' definition, also suffer from "line-drawing problems" and would likewise fall if the existence of underinclusion and overinclusion problems were sufficient to make a law irrational. Pet. App. 37a.

Like the district court, the Sixth Circuit also concluded Michigan's marriage amendment was not motivated by animus; it merely "codified a long-existing, widely held social norm already reflected in state law." Pet. App. 40a. "[I]f there was one concern animating the initiatives, it was the fear that the courts would seize control over an issue that people of good faith care deeply about." Pet. App. 41a. It is just as "unfair to paint the proponents of the measures as a monolithic group of hate-mongers" as it is "to paint the opponents as a monolithic group trying to undo American families." Pet. App. 44a.

As for substantive due process, the majority reiterated this Court's test: whether the asserted right is " 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.' " Pet. App. 46a (quoting *Washington* v. *Glucksberg*, 521 U.S. 702, 721 (1997)). And it concluded that the petitioners' claim does not satisfy this test because "[t]he first state high court to redefine marriage to include gay couples did not do so until 2003." Pet. App. 46a. Nor, the court reasoned, did *Loving* v. *Virginia*, 388 U.S. 1 (1967), change this analysis, as evidenced by the fact that, just five years after *Loving*, this Court in *Baker* v. *Nelson* rejected the same due-process argument the petitioners make here. Pet. App. 47a.

The court of appeals also declined to create a new suspect class based on sexual orientation, noting that while "gay individuals have experienced prejudice in this country," "the institution of marriage arose independently of this record of discrimination," which shows that "[t]he usual leap from history of discrimination to intensification of judicial review does not work." Pet. App. 51.

Finally, the court concluded that even taking into account "evolving moral and policy considerations" under the "living constitution" theory, the focus would be "on evolution in *society's* values, not evolution in *judges'* values." Pet. App. 57. Because the objective evidence of society's values can be seen in the fact that, "[f]reed of federal-court intervention, thirty-one States would continue to define marriage" as only between a man and a woman, the majority concluded it had no right "to say that societal values, as opposed to judicial values, have evolved toward agreement in favor of" plaintiffs' marriage definition. Pet. App. 57a.

## SUMMARY OF ARGUMENT

The Fourteenth Amendment and this Court's cases interpreting it say nothing about how to define marriage or the policy goals marriage must serve. That is why a majority of circuits have been unable to coalesce around any one of the petitioners' legal theories. As the public discussion shows, all sides of the marriage debate can present good-faith policy arguments supporting their definition. These varying views are the essence of democracy and the reason the Court should leave this decision where the U.S. Constitution places it: in the hands of the states, through either the amendment process or state-level democracy. Our constitutional system entrusts to the people this liberty to engage in public debate and governance.

1. The liberty to engage in self-government is the fundamental right at stake in this case, a right held by all members of society in common. The issue of how to define marriage has been subject to a vigorous debate that is still ongoing. After the casting of more than 70 million votes, 11 states' marriage laws have been expanded to include same-sex couples; the other states' laws have not. That public conversation should continue without judicial interference.

2. The state's primary interest in defining marriage as between opposite-sex couples is to encourage individuals with the inherent capacity to bear children to enter a union that supports child rearing. Michigan's marriage laws have nothing to do with animus toward anyone, and it would take a radical alteration of this Court's constitutional doctrines to hold that the Constitution *requires* the redefinition of marriage.

3. There is no due-process right to any particular marriage definition. And it would be illogical to hold that Michigan's marriage definition violates due process when its opposite-sex character provides Michigan's primary interest in having a marriage institution at all. As this Court observed in *Windsor*, the "*limitation* of lawful marriage to heterosexual couples . . . for centuries has been deemed both necessary and fundamental." 133 S. Ct. at 2689 (emphasis added). If that limitation has historically been deemed fundamental to what marriage is, it cannot also be true that marriage *without* the limitation is so "deeply rooted" that it qualifies as a due-process right. Jettisoning the "deep roots" requirement would transform the due-process doctrine into a quagmire with adverse consequences, predictable and unpredictable.

4.a. Michigan's marriage laws satisfy rational-basis review. The petitioners concede that Michigan pursues a legitimate interest and reasonably promotes that interest by acknowledging that marriage brings stability to families and promotes positive child outcomes. Pet. Br. 22, 37. The fact that Michigan's marriage definition may be under- or overinclusive is no ground to invalidate it. It is not Michigan's burden to prove that *excluding* a group will promote a law's purpose. To the contrary, when "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not, we cannot say that the statute's classification of beneficiaries and nonbeneficiaries is invidiously discriminatory." *Johnson* v. *Robison*, 415 U.S. 361, 383 (1974). Responding to the reality that a man and a woman are generally able to create new life neither discriminates nor entails animus at all.

4.b. Michigan's marriage laws should not be subjected to heightened scrutiny under any theory. "Sexual orientation" is not a protected class under this Court's traditional four-part test, as the vast majority of circuits have recognized. More important, Michigan's marriage laws do not discriminate based on sexual orientation; they classify based on biological complementarity.

Michigan's marriage laws also do not unlawfully discriminate based on sex. The laws treat both sexes equally in terms of rights and duties and do so without engaging in any stereotyping about the proper role of either sex in a marriage.

Michigan's marriage laws have nothing to do with illegitimacy. Even Michigan's non-marriage laws do not treat illegitimate children differently based on their status. If any state's laws did so, the children would be free to bring a claim of discrimination on that basis.

Michigan's marriage laws also satisfy heightened scrutiny if it were to be applied. Michigan's marriage definition is as narrowly tailored as possible. Michigan cannot exclude infertile couples from its marriage definition without running afoul of the Constitution. Nor can Michigan expand its marriage definition without causing erosion of the procreation paradigm that motivated Michigan's focus on opposite-sex couples from the beginning.

In sum, absent a radical change in this Court's jurisprudence, the Constitution leaves it to the people of each state to choose a philosophy of marriage. The court of appeals should be affirmed.

## ARGUMENT

### I. In the absence of a recognized constitutional right, the Constitution reserves to the states the role of defining marriage.

When the Constitution does not vest a power in the federal government, that power is reserved for the states, as is "the right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times." *Coalition to Defend*, 134 S. Ct. at 1636–37 (plurality). For this reason, "voting is of the most fundamental significance." *Illinois State Bd. of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 184 (1979). And that right, exercised indirectly by electing representatives or directly through ballot initiatives and referenda, is "a fundamental right held not just by one person but by all in common." *Coalition to Defend*, 134 S. Ct. at 1637 (plurality).

Consequently, respecting dignity in a democracy is not limited to preserving liberty to engage in private conduct, *e.g.*, *Lawrence* v. *Texas*, 539 U.S. 558, 578 (2003); it includes the liberty to engage in self-government, *Burson* v. *Freeman*, 504 U.S. 191, 214 (1992) (Kennedy, J., concurring); The Honorable Stephen Breyer, Active Liberty: Interpreting Our Democratic Constitution (2005). That liberty is the fundamental right at stake here. In fact, only that liberty made it possible for 11 states already to *choose* to issue marriage licenses to same-sex couples—a feat not likely achievable at the federal level and impossible at the state level without democratic rights of debate and self-determination by state citizens.

Nothing in the Fourteenth Amendment's text or history requires a state to license a marriage between two people of the same sex. So, since 1996, the citizens of *every* state have exercised their liberty to vote on this precise issue. More than 74 million Americans in 35 states have done so directly, either in constitutional amendments or in statutory referenda. App. A. And in each of the other 15 states, legislatures have addressed marriage, with 12 passing laws. App. B. As this Court recognized in another context, "[t]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Graham* v. *Florida*, 560 U.S. 48, 62 (2010) (quotations omitted). While proponents of changing the marriage definition point to recent polls or lists of signatures in support of their policy preference, these bellwethers ring hollow in the face of the record of the actual democratic process. Compare, *e.g.*, Human Rights Campaign *Amici* Br. 1 (200,000 signatures supporting extending marriage to same-sex couples), with App. A (more than 70 *million* votes cast addressing the definition of marriage).

The petitioners stress that "same-sex couples [are] now allowed to marry in thirty-seven states." Pet. Br. 22. But only 11 states adopted the petitioners' marriage definition by legislative act or popular vote. In the other 26, courts took the issue away from the people, including those who would cast a vote in favor of a new view of marriage. The process of social change cannot be short-circuited by the lower federal courts, however numerous their decisions. And this movement has been so hasty and abrupt that no one can know the consequences of the change, or the settled view of the American people.

Because the Constitution is silent regarding marriage, such court orders indicate a lack of faith in democracy. By teaching that courts are the fastest mechanism to achieve social change, such decisions encourage reliance on the courts for change and thus weaken democracy. This approach lessens the very dignity that the petitioners seek; rather than achieving the dignity that comes from persuading fellow citizens through the democratic process, a litigation victory merely means that a court order requires compliance.

When the federal courts create new rights with no constitutional tether, we effectively cease to have a written Constitution, living or not, and become a society governed by unelected judges who have assumed the authority to bind society with their own views of how we should interact. There is a high cost to such judicial actions—a loss of the fundamental liberty of self-governance—that goes far beyond this case's immediate context. When courts override the democratic process with such insubstantial constitutional underpinnings, it is hard to imagine what social or political question might not be the subject of the next litigation campaign. That will affect the nature of the federal judiciary and the rule of law (poisoning the process of nomination and confirmation with demands for specific outcomes), no less than it affects the nature of our representative process, which will be sidelined.

There is also a serious cost to mutual civility and respect if the courts declare the long-held marriage definition beyond constitutional bounds. It is one thing for citizens to accept a seachange in fundamental institutions based on their fellow citizens' good-faith

views; it is quite another for them to acquiesce in the charge that their own cherished beliefs are hateful and contrary to constitutional values. That is a recipe for perpetuating this social and moral divide, not for transcending it.

Such a holding would also make it difficult for the people to enact and enforce accommodations for churches and other institutions with deeply held objections to this marriage redefinition. Most legislatures to enact same-sex marriage have also passed accommodations for dissenters. A ruling for the petitioners will not do so and, if predicated on moral claims of irrationality or animus, will make the enactment of accommodations difficult at best.

Notably, federal circuits that have ruled in favor of challengers in these cases have placed the United States out of step with multi-national and constitutional courts around the world—such as the United Nations Human Rights Committee and the European Court of Human Rights—which have consistently ruled that the people, not the judiciary, must decide how to define marriage. *Amici* Br. for 50 Int'l & Comparative Law Experts. These decisions correctly recognize that marriage's definition is not a legal issue; it is a public-policy issue, with arguments on both sides. That definition is best left to the political process and, in our federal system, to the diverse and decentralized states. Because the Constitution does not require states to adopt any particular view of marriage, the public conversation should continue regarding how the marriage institution should be defined and understood.

## II. Marriage has traditionally been defined as only between opposite-sex couples because the state's interest in marriage has always been to encourage individuals with the inherent capacity to bear children to enter a union that supports raising children.

"Until a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex." *Hernandez* v. *Robles*, 7 N.Y.3d 338, 361 (2006) (plurality). The reason this was so, regardless of people's varying views on same-sex relationships, was their recognition of the indisputable point that the "union of man and woman[ ] uniquely involve[s] the procreation . . . of children" and thus the need for "[t]he institution of marriage" to "rear[ ] . . . [those] children within a family." *Baker* v. *Nelson*, 191 N.W.2d 186, 186 (Minn. 1971), appeal dismissed, 409 U.S. 810 (1972).

This Court and others have consistently recognized that government interest, declaring that "[m]arriage and procreation are fundamental to the very existence and survival of the race." *Skinner* v. *State of Okl. ex rel. Williamson*, 316 U.S. 535, 541 (1942). "[T]he first purpose of matrimony . . . is procreation." *Baker* v. *Baker*, 13 Cal. 87, 103 (1859). "It has been said in many of the cases cited that one of the great purposes of marriage is procreation." *Gard* v. *Gard*, 204 Mich. 255, 267 (1918). "[M]arriage is a compact between a man and a woman for the procreation . . . of children." *State* v. *Fry*, 4 Mo. 120, 126 (1835) (quoting Sir Francis Bacon, 6 Bacon Abr. 523, 530).

In Michigan, as elsewhere, there is no obligation to have children in marriage. Yet it is undeniable that two sexes are necessary to create children. A man and a woman uniquely have the inherent ability together to have a child biologically connected to both parents without the involvement of third parties, involvement that introduces cost and legal complexity. Through marriage, a state recognizes this reality.

Michigan's marriage definition does not disparage the ability of others to provide loving homes or establish a stable, nurturing setting for children. Providing public benefits for opposite-sex couples to marry reflects no animus toward individuals outside that rubric but merely reflects the reality that the state's interest in recognizing—and thus providing public benefits for—a private relationship at all stems from its relationship to procreation, and the raising of children. Without that compelling public interest, the state's intrusion would threaten individual liberty.

Separating marriage from procreation dramatically changes the state's interest in the institution. Yet that is what petitioners urge as they argue that the "freedom to marry is entirely separate from an ability or desire to procreate." Pet. Br. 62. If that is true, it is unclear what interest the state would have in recognizing and providing public benefits for the relationship. It is the state's interest to encourage opposite-sex couples to enter into a permanent, exclusive union within which to have and raise children that motivates state marriage laws. The federal government advances the same interest by providing funding under Title V—authorized and appropriated by the Affordable Care Act—for state

programs that teach future adults (i.e., teenagers) that "bearing children out-of-wedlock is likely to have harmful consequences for the child, the child's parents, and society."[1] Thirty-six states accept federal funding and promote this interest, including not only Michigan, but states such as Hawaii, Maryland, Minnesota, New Hampshire, and New York that, by popular vote or legislative act, issue marriage licenses to same-sex couples,.[2]

The petitioners argue that Michigan's marriage definition harms the children of same-sex couples by excluding them from benefits and stability. Pet. Br. 24–27. But this argument applies to any marriage definition where children are being raised by caregivers unable or unwilling to marry. For now and for the foreseeable future, great numbers of children in American will be raised by unmarried persons and couples, and there is no marriage regime that will alter that social fact. For example, historically, the primary competing marriage model has been plural marriage, which remains legal in many countries, and there are *thousands* of children in America being raised in such households. Many more are raised by loving grandparents or siblings. It is wrong to suggest that children raised in all of these non-marital households are stigmatized, humiliated, or demeaned by marriage laws. If the petitioners' argument is correct, the state should recognize all these familial structures as marriages.

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[1] http://www.acf.hhs.gov/programs/fysb/resource/aegp-fact-sheet (visited Feb. 23, 2015).

[2] http://www.acf.hhs.gov/programs/fysb/resource/2013-title-v-aegp-awards (visited March 5, 2015).

In light of the state's conception of marriage's purpose, it is unsurprising that *Baker* v. *Nelson*—decided several years after *Loving*'s due-process holding—rejected the same claims raised here as not raising a substantial federal question. 409 U.S. at 810. As this Court recently observed in a different context, "[a]ny test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change." *Town of Greece, N.Y.* v. *Galloway*, 134 S. Ct. 1811, 1819 (2014).

It would take a radical alteration of this Court's jurisprudence to hold that the petitioners' redefinition of marriage is constitutionally *required*, and that the 30 states which have enacted constitutional provisions on this issue in the last 20 years all did so in violation of the U.S. Constitution. This Court's various doctrinal tests are meant to track "history and tradition," not supplant them. *Rutan* v. *Republican Party of Illinois*, 497 U.S. 62, 103 (1990) (Scalia, J., dissenting, joined by Rehnquist, C.J., and Kennedy and O'Connor, JJ.). The people of Michigan have elected to provide legal support for and to foster relationships that may lead biologically to children. The people could also elect to support a different marriage institution. That freedom is what the democratic process contemplates. As the next sections show, the petitioners' claims for a judicial redefinition of marriage fail under every doctrinal test this Court has adopted to address the legal theories the petitioners assert.

## III. There is no substantive-due-process right to a particular marriage definition.

This Court's cases recognizing a substantive-due-process right to marriage have involved state laws that imposed novel and/or arbitrary limits on the traditional core definition. *E.g.*, *Zablocki* v. *Redhail*, 434 U.S. 374 (1978) (striking Wisconsin law prohibiting marriage license to those who owed child support); *Turner* v. *Safley*, 482 U.S. 78 (1987) (no marriage license for those in prison); *Loving* v. *Virginia*, 388 U.S. 1 (1967) (criminal penalties for interracial marriage).[3] These invalidated laws were inconsistent with the original understanding of marriage as set forth above.

The petitioners seek something quite different here: a due-process right to an *expanded* definition of marriage they prefer—the right of two consenting partners to marry regardless of "the gender of the partners," Pet. Br. 60, which, despite the petitioners' protestations, is simply the right to same-sex marriage by another name. In its *amicus* brief, the United States does not even advance this argument. And the argument suffers from two fatal flaws.

1. Under this Court's long-established test, substantive-due-process rights must be "deeply rooted in this Nation's history and tradition." *Washington* v. *Glucksberg*, 521 U.S. 702, 722 (1997). As this Court

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[3] In addition to a distinction based on race being arbitrary and invidious, race was not a traditional limitation on marriage, certainly not outside this country, and not even in this country despite the tradition of slavery. David R. Upham, *Interracial Marriage and the Original Understanding of the Privileges or Immunities Clause*, 42 Hastings Const. L.Q. 213 (2015).

recently observed, "until recent years, many citizens had not even considered the possibility that two persons of the same sex might" marry. *United States* v. *Windsor*, 133 S. Ct. 2675, 2689 (2013). Quite the opposite, the "*limitation* of lawful marriage to heterosexual couples . . . for centuries has been deemed both necessary and fundamental." *Id.* at 2689 (emphasis added). If the limitation has historically been deemed fundamental to what marriage is, it cannot also be true that marriage *without* the limitation is so "deeply rooted" that it qualifies as a due-process right. So, to recognize a right to marriage without gender, the Court would have to abandon the reasoning and holding of the decision it issued just two years ago in *Windsor*.

Citing *Lawrence* v. *Texas*, 539 U.S. 558, 572 (2003), the petitioners suggest this Court has already discarded *Glucksberg*'s "ancient roots" test. Pet. Br. 58. But that is not what *Lawrence* held. There, this Court determined that state anti-sodomy laws were not deeply rooted, and that it "was not until the 1970's that any State singled out same-sex relations for criminal prosecution." *Id.* at 570. The "emerging awareness" the Court described in *Lawrence* was the deep-rooted tradition of protecting how adults "conduct their private lives in matters pertaining to sex." *Id.*

Significantly, modifying *Glucksberg* to accommodate the petitioners' claim would have far-reaching effects. The reason rights must be "deeply rooted" is "to rein in" the necessarily "subjective elements" of substantive-due-process review. *Glucksberg*, 521 U.S. at 722. This requirement ensures that rights will be recognized through the democratic process rather than

imposed on the public by federal courts. See *id.* at 723 (rejecting assisted suicide as a substantive-due-process right because doing so would "reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State"); cf. *Town of Greece, N.Y.* v. *Galloway*, 134 S. Ct. 1811, 1819 (2014) ("Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change.").

If courts have leeway to develop new rights that lack "deep roots," the power the Constitution gave the people, working through the legislative, referendum, and amendment processes, is commandeered by judicial legislators, in violation of bedrock separation-of-powers principles. That is precisely the outcome the Sixth Circuit majority cautioned against when it upheld Michigan's marriage laws. Pet. App. 60a–61a ("It is dangerous and demeaning to the citizenry to assume that *we*, and only *we*, can fairly understand the arguments for and against gay marriage.").

As is often the case with substantive-due-process claims that cannot satisfy *Glucksberg*, altering the constitutional test leaves lower courts at sea. Every line that states have historically drawn around marriage would be subject to strict scrutiny. Few would appear to be narrowly tailored to a compelling interest. For example, to prevent coercion, every state prohibits underage couples from marrying. Yet this ban is also over- and underinclusive and therefore could not withstand strict scrutiny. The same is true of other longstanding marriage limitations, enforced in every state, that are already being called into question in other litigation.

The consequence is either to dispense with limits on "marriage" and render the term meaningless, or to allow courts to water down strict scrutiny to uphold such restrictions, thereby muddling the law. See *Employment Div.* v. *Smith*, 494 U.S. 872, 886 n.3 (1990) (making a similar point for why strict scrutiny should not be applied to religion-neutral laws). The Court should not abandon *Glucksberg*'s clarity or its democracy-promoting constraints on judges.

2. Of all the traditional limitations on marriage, it is most difficult to say that the opposite-sex limitation violates substantive due process, since the opposite-sex right to procreate is the key reason why this Court has recognized any due-process right in marriage at all. The Court has never suggested that a right to marriage requires government recognition.

This Court has held to the contrary that "the Due Process Clause generally confers no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests." *DeShaney* v. *Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989). "Although the liberty protected by the Due Process Clause affords *protection against unwarranted government interference*," "it does not confer an *entitlement* to such [governmental aid] as may be necessary to realize all the advantages of that freedom." *Id.* (emphasis added). Thus, the Court in *DeShaney* held that a child in state custody had no constitutional right against the state's repeated placement of him with his biological father, even though the state knew the boy might have been a victim of abuse. *Id.* at 192, 196.

So why has this Court recognized a due-process right for opposite-sex couples to marry? At the time the Court decided those cases, a marriage license was a necessary prerequisite to sexual relations and childbearing. "For most of this country's history," "the choice to live in an intimate relationship outside of marriage left consenting adults potentially vulnerable to criminal prosecution." Ariela R. Dubler, *From* McLaughlin v. Florida *to* Lawrence v. Texas: *Sexual Freedom and the Road to Marriage*, 106 Colum. L. Rev. 1165, 1168 (2006); accord, *e.g.*, Mich. Comp. Laws § 750.335 (criminalizing unmarried cohabitation). If an opposite-sex couple desired to procreate and raise children, the only way to do that legally was to get married. The state's denial of a marriage license was, for practical purposes, denial of the right to sexual intimacy and children. This Court's recognition of a due-process right to marry was necessary to guarantee *underlying* freedoms and privacy.

In *Zablocki* v. *Redhail*, 434 U.S. 374, 386 (1978), for example, this Court held that "if [a couple's] right to procreate means anything at all, it must imply some right to enter the only relationship in which the State of Wisconsin allows sexual relations legally to take place." That was because Wisconsin criminalized sex between unmarried people. Describing marriage as a "right of privacy," *id.* at 384, the Court compared marriage to other personal decisions "that an individual may make without unjustified government *interference*," i.e., interference with underlying negative liberties such as procreation, contraception, family relationships, and child rearing. *Id.* at 385 (emphasis added).

Similarly, in *Loving*, had Mildred Jeter and Richard Loving had a sexual relationship without a marriage license, Virginia could have criminally prosecuted them for fornication. Va. Code Ann. § 18.2-344. The Court described the "freedom to marry" as "one of the vital personal rights essential to the orderly pursuit of happiness." *Id.* 388 U.S. at 12. That "happiness" did not flow from a state license or benefits; it was connected to the human race's "very existence and survival," *id.*, i.e., procreation. (Laws against miscegenation had only one purpose: to give legal force to the idea that members of the black race were inferior to members of the white race such that they should not be allowed to mix and have children. Michigan's marriage laws are based on the independent principle of complementarity and do not suggest the inferiority of those outside that rubric. Moreover, Michigan's laws have nothing whatever to do with inferiority of women to men, or men to women. *Loving* is inapposite to this case.)

In *Turner* v. *Safley*, 482 U.S. 78 (1987), the Court struck marriage limits for prisoners, reasoning that "most inmate marriages are formed in the expectation that they ultimately will be fully consummated." *Id.* at 95–96. The Court recognized other marriage attributes, such as "emotional support and public commitment" and "receipt of government benefits," *id.* at 96—all benefits of same-sex marriage as asserted by petitioners—but distinguished *Butler* v. *Wilson*, 415 U.S. 953 (1974), in which the Court *upheld* a marriage ban for prisoners serving a life sentence. *Safley*, 482 U.S. at 96. A person serving a life sentence could be the beneficiary of emotional support, recognition, and benefits, but has no expectation of procreation.

To reiterate, this Court has generally justified a right to marriage as protecting against government *interference* in private procreative conduct, not as requiring government *recognition*. That is why if a state got out of the business of recognizing relationships entirely (no more government-sanctioned marriage; no prohibitions on sexual activity or cohabitation), there would be no constitutional injury to anyone. The right to prevent government interference with private intimacy is a world away from a right to obtain special tax treatment and survivor benefits. And a right to marriage without regard to procreation would eliminate the primary justification as to why a state has any interest at all in marriage. The petitioners request a transformation of the substantive-due-process doctrine from one that protects negative rights as a shield into one that guarantees positive rights as a sword—a change that would have far-reaching impacts in areas of the law that have nothing to do with marriage.

Transformation of substantive due process into an affirmative right is inconsistent with this Court's precedents. *DeShaney*'s holding is consistent with the Court's rejection of other claims to positive rights, such as shelter for the homeless, *Lindsey* v. *Normet*, 405 U.S. 56, 74 (1972), and a public education, *San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 35 (1973). It would require a significant change in this Court's substantive-due-process jurisprudence to recognize a right that does not prohibit government interference, but instead requires government recognition of certain relationships as a marriage and provision of all attendant governmental benefits. The Court should decline to do so.

## IV. Michigan's opposite-sex definition of marriage does not violate equal protection.

### A. Michigan voters acted rationally in defining marriage.

Michigan's marriage definition is focused on the reality that only opposite-sex relationships have the inherent capacity to bear children and the ability to provide a biologically connected mother and father. This definition has existed since time immemorial and is not rooted in animus toward same-sex couples or even an unwarranted stereotype that same-sex couples cannot provide a loving setting for children.

In the current marriage debate, the marriage institution is understood in different ways. This is an issue on which people of good will may reasonably disagree. And the views of the people of Michigan are reasoned, not bigoted. There are certainly reasons to expand the marriage definition to include same-sex couples, including reasons that likewise seek to promote child welfare. But the proper recourse to resolving disagreements in a democracy is continued discussion and resolution through the voting process. The proper recourse is not to the federal courts, but to the people. That is how American democracy is supposed to work. Michigan's marriage laws easily satisfy rational-basis review, and the United States does not argue otherwise in its *amicus* brief.

### 1. The rational-basis standard defers to voters in order to protect the democratic process.

The rational-basis standard of review is an important guarantor of judicial restraint and separation of powers because it preserves the people's authority to govern themselves by making policy decisions. The Equal Protection Clause "is not a license for courts to judge the wisdom, fairness, or logic of [the voters'] choices." *FCC* v. *Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). To the contrary, "the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent [a state's] interests should be pursued." *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 441–42 (1985).

As the Fifth Circuit recently explained, the rational basis test "affirms a vital principle of democratic self-government": "[t]he court may not replace legislative predictions or calculations of probabilities with its own, else it usurps the legislative power." *Planned Parenthood of Greater Texas Surgical Health Servs.* v. *Abbott*, 748 F.3d 583, 594 (5th Cir. 2014). "Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function." *Beach Commc'ns*, 508 U.S. at 315 (internal quotation marks omitted). That is why "rational basis review" includes "a strong presumption of validity" and is a "paradigm of judicial restraint." *Id.* at 314–15.

The limitations imposed on a court applying rational-basis review serve this important interest. Under rational-basis review, courts give the legislative body—here, the people themselves—the benefit of every doubt: "those attacking the rationality of the legislative classification have the burden 'to negate every conceivable basis which might support it.' " *Beach Commc'ns*, 508 U.S. at 315 (quoting *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)). " 'States are not required to convince the courts of the correctness of their legislative judgments.' " *Heller* v. *Doe*, 509 U.S. 312, 326 (1993). If " 'the question is at least debatable,' " then rational-basis review requires upholding the legislative judgment. *Id.* (quoting *W. & S. Life Ins. Co.* v. *State Bd. of Equalization of Cal.*, 451 U.S. 648, 674 (1981)).

These conceivable bases do not have to be proved by evidence at a trial, a fact the district court ignored: "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Id.*; *Heller*, 509 U.S. at 320 ("A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification."); *Lockhart* v. *McCree*, 476 U.S. 162, 168 n.3, 169 (1986) ("We are far from persuaded . . . that the 'clearly erroneous standard' of Rule 52(a) applies to the kind of 'legislative' facts at issue here."); Fed. R. Evid. 201 advisory committee's note (explaining the difference between adjudicative facts and legislative facts). And "[t]hese restraints on judicial review have added force 'where the legislature must necessarily engage in a process of line-drawing.' " *Beach Commc'ns*, 508 U.S. at 315 (quotation omitted).

This added force applies here because defining marriage inherently requires line-drawing—lines such as number of participants, sex, consanguinity requirements, duration, and exclusivity. (Indeed. *all* marriage definitions, even the petitioners', require some line-drawing.) And as this Court has made clear, "[e]ven if [a] classification . . . is to some extent both underinclusive and overinclusive, and hence the line drawn by [the legislature or people] is imperfect, it is nevertheless the rule that in [rational-basis review] 'perfection is by no means required.'" *Vance* v. *Bradley*, 440 U.S. 93, 108–09 (1979) (quoting *Phillips Chemical Co.* v. *Dumas Sch. Dist.*, 361 U.S. 376, 385 (1960)).

### 2. Defining marriage as between a man and a woman advances legitimate state interests.

#### *a. Encouraging opposite-sex couples to enter into a permanent, exclusive union within which to have and raise children is a legitimate state interest advanced by Michigan's marriage law.*

The first question in considering whether it is rational to define marriage as between only one man and one woman is to identify the state's interest in recognizing and providing public benefits for a private relationship at all. While many married people consider emotional connection to be an important marriage component, the states have never shown interest in recognizing emotional connection alone. Friendships, after all, can also demonstrate love and commitment; yet no state has passed laws about what it takes to enter into a friendship, or what it takes to end one.

If marriage, like other friendships, were only about an emotional connection—if it were only about commitment and companionship—then it would be unclear what interest (other than moral approval of that friendship) the state might have. That is one reason why the state expresses no interest in religious and non-religious marriage or commitment ceremonies.

As explained in § II, *supra*, Michigan's interest in marriage as a public institution—separate from other relationships that have an emotional connection—springs from a feature of opposite-sex relationships that is biologically different than all other relationships (including opposite-sex platonic friendships and same-sex relationships): the sexual union of a man and a woman produces something more than just an emotional relationship between two people—it produces, without the involvement of third parties or even a conscious decision, the possibility of creating a new life. Michigan's marriage definition is designed to stabilize such relationships, to promote procreation within them, and to be the expected standard for opposite-sex couples engaged in sexual relations.

Courts have never questioned the legitimacy of a state's interest in promoting procreation and ensuring that children are raised in a stable family that enhances the likelihood of success and minimizes the possibility that government will have to step in and provide care. That is why the petitioners do not disagree with the legitimacy of Michigan's interest *or* that Michigan's recognition of marriage and provision of benefits to married couples reasonably promotes that interest. Like Michigan, the petitioners assert that marriage "is a commitment like no other in society."

Pet. Br. 22. They recognize that the institution "grounds couples" and encourages them "to stay together when times are hard." *Id.* "Marriage brings stability to families." *Id.* And "family stability is strongly associated with positive child outcomes." Pet. Br. 37. So even the petitioners implicitly acknowledge that Michigan has satisfied rational-basis review.

In the face of Michigan's reasonable policy supporting a legitimate interest, those challenging state marriage laws raise three objections. None of the objections shows that Michigan's definition is irrational.

*i. The "infertility" objection does not negate the rationality of Michigan's marriage definition.*

The petitioners argue that Michigan's marriage definition does not satisfy rational-basis review because "the sterile and the elderly are allowed to marry." Pet. Br. 37. But while not every marriage results in children, it remains true that every child has a biological mother and father. Michigan's marriage policy tries to maximize the likelihood that every child will know and be raised by his or her mother and father when possible. The petitioners' objection suffers from three infirmities.

First, as previously noted, overinclusion is not a defect under rational-basis review. *Vance* v. *Bradley*, 440 U.S. 93, 108–09 (1979); accord *Heller*, 509 U.S. at 321. "[T]he Constitution does not require the [state] to draw the perfect line nor even to draw a line superior to some other line it might have drawn. It requires only that the line actually drawn be a rational line."

*Armour* v. *City of Indianapolis*, 132 S. Ct. 2073, 2083 (2012). Because Michigan's line is rational, over-inclusiveness is legally irrelevant.

Second, Michigan's marriage definition is not actually overinclusive, as sterility and fertility testing are a severe invasion of privacy. *Baskin* v. *Bogan*, 766 F.3d 648, 662 (7th Cir. 2014); *Kitchen* v. *Herbert*, 755 F.3d 1193, 1222 (10th Cir. 2014). And without such testing, it is nearly impossible to know whether a male or female could procreate (within or without a marriage). Even in the rare case when it is clear that an opposite-sex couple cannot conceive children, they demonstrate the importance of keeping sexual intimacy within the confines of marriage, advancing the state's interest, and would provide any adopted child the benefit of a both a mother and a father. (A same-sex couple, too, can provide an adopted child with loving parents, but that does not negate the state's interest in its current marriage definition.)

Third, the petitioners' infertility objection proves too much: it would require a licensing state to "test" to ensure that all couples applying for a marriage license satisfy the state's purported interest. If marriage is more about "love and commit[ment]" than having children, see Pet. 23, and if the petitioners are correct that a state cannot draft an overinclusive marriage definition, then a state must also test whether two persons applying for a marriage license are truly committed to each other (or are instead getting married for other reasons). The impossibility of performing such testing would not only exclude the petitioners' own theory of marriage, it would also prevent a state from enacting *any* marriage definition.

### *ii. The "exclusion" objection does not negate the rationality of Michigan's marriage definition.*

The petitioners also argue that excluding same-sex couples from the marriage definition does not advance Michigan's goal and simply burdens same-sex couples. Pet. Br. 36–37. This objection, too, is faulty, as it rests on a premise that this Court has never endorsed: that a state must provide a chosen benefit to all unless it can prove that *excluding* a group would promote the program's purpose. To the contrary, when "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not, we cannot say that the statute's classification of beneficiaries and nonbeneficiaries is invidiously discriminatory." *Johnson* v. *Robison*, 415 U.S. 361, 383 (1974).

No state law could satisfy the petitioners' requirement. For instance, assume a state wanted to provide free books to K–2 students in an urban school district. Under the petitioners' test, the law would be invalid unless the state could prove that excluding rural children and third graders promotes the state's interest in encouraging reading. The Court has never endorsed such a test, and it should not do so here.

Moreover, it is not at all clear that expanding Michigan's marriage definition is cost-free. Will redefining Michigan's marriage definition to include same-sex couples change the meaning of the institution? The *petitioners* answer that question unequivocally: yes. The entire last section of the petitioners' brief is devoted to pressing the point that the "freedom to marry is entirely separate from an

ability or desire to procreate." Pet. Br. 62–64. If correct, that is precisely Michigan's point—Michigan's marriage definition is intended to connect sexuality and having children with the institution of marriage, not to separate them.

That said, it is not Michigan's burden to prove that declining to expand its marriage definition to same-sex couples serves the legitimate interest in linking marriage and procreation. Michigan need only demonstrate that including opposite-sex couples serves that interest. It does.

*iii. The "efficacy" objection does not negate the rationality of Michigan's marriage definition.*

Judge Posner, writing for the Seventh Circuit, rejected Indiana's and Wisconsin's marriage definitions (under a heightened-scrutiny analysis) because there was no indication that the laws positively impacted the out-of-wedlock birthrate. *Baskin*, 766 F.3d at 664. This objection ignores the reality that those laws still benefitted children of opposite-sex couples. The objection also rests on logical fallacy.

First, it would be a plaintiff's burden to show that a state's marriage policy has no effect. Under the rational-basis standard, this Court does not require a state to prove by adjudicative fact the rationality of its adopted policy; a challenger must negate every conceivable basis that supports the law:

> [A] classification "must be upheld against equal protection challenge if there is *any* reasonably conceivable state of facts that could

> provide a rational basis for the classification." A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. "[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence of empirical data." A statute is presumed constitutional, and "[t]he burden is on the one attacking the legislative arrangement to negate *every conceivable basis* which might support it," *whether or not the basis has a foundation in the record.* [*Heller*, 509 U.S. at 319–21 (emphasis added).]

Second, the Court's negate-every-conceivable-basis standard is an impossible burden for those challenging state marriage laws to carry given the many other variables that affect the non-marital birthrate. *E.g.*, Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. Rev. 59, 63 (1987) ("The decline in th[e] stigma [of illegitimacy] is also partly responsible for the increase in premarital sex and the casual attitude of many engaged in it about contraception."). And even if there were no demonstrable effect at all, it would not be irrational for a state to think things would be worse without the law.

Third, if there is no connection between state marriage policy and encouraging any pregnancies to occur within the confines of a marriage union, that lack would suggest marriage is irrational for everyone, *not* that an irrational program should be *extended* to provide *more* government rights and duties to more people. When a plaintiff proves a law's irrationality, the remedy is to strike it down, not broaden its scope.

The lesson with respect to all three of the above-noted objections is that the "Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients." *Dandridge* v. *Williams*, 397 U.S. 471, 487 (1970). The "Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all." *Id.* at 486–87. "It is enough that the State's action be rationally based and free from invidious discrimination." *Id.* at 487. Michigan's law meets that test.

Federal courts "will not overturn [a classification] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [this Court] can only conclude that the [classifications] were irrational." *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 84 (2000) (citation and quotation marks omitted). And it cannot be said that varying treatment based on the biological difference between same-sex and opposite-sex couples is irrational or constitutes invidious discrimination. "To fail to acknowledge even our most basic biological differences . . . risks making the guarantee of equal protection superficial, and so disserving it." *Nguyen* v. *INS*, 533 U.S. 53, 73 (2001).

*b. Michigan's marriage laws value the contributions that both sexes bring to parenting.*

It is within the realm of reason to believe that children benefit from being raised by both a mother and a father. Men and women are different, and having both a man and a woman as part of the parenting team could reasonably be thought to be a good idea. It is not irrational to think that mothers and fathers both might make important contributions.

This Court has recognized that " '[t]he two sexes are not fungible; a community made up exclusively of one is different from a community composed of both.' " *Ballard* v. *United States*, 329 U.S. 187, 193 (1946). In *Ballard*, in the context of whether women needed to be included on juries, the Court recognized that "a distinct quality is lost if either sex is excluded." *Id.* If this principle—that both men and women have important viewpoints and contributions to make—is true in the context of a jury pool, it is certainly rational that the principle may apply in the context of a family.

Even the petitioners' experts agree there are "average differences in the ways that mothers and fathers interact with their children," J.A. 35, that "different sexes bring different contributions to parenting," and that "there are different benefits to mothering versus fathering." J.A. 168–69. If, as the petitioners' experts conclude, mothers and fathers provide different benefits, it is hard to see how it could be irrational to encourage a structure that brings both sets of benefits to children. A rational person, in short, might think that " '[t]he optimal situation for the child

is to have both an involved mother and an involved father.' " *Bowen* v. *Gilliard*, 483 U.S. 587, 614 (1987) (Brennan, J., dissenting). That is certainly not the only view. But again, in a democratic society, that view is entitled to respect where it emerges from the people's fundamental right to govern themselves.

The petitioners make the same "exclusion" argument that they raised in connection with Michigan's attempt to link marriage and procreation. Pet. Br. 39 ("there is no rational connection between the *exclusion of same-sex couples* from marriage and the State's claimed interest in providing children with role models of both genders) (emphasis added). As noted above, this has never been the test under rational-basis review, and adding an underinclusive component to the test would result in the invalidation of nearly every state law on any topic.

Finally, the petitioners claim that Michigan's parenting interest "presumes stereotypical gender-based roles in opposite-sex marriages that are as factually antiquated as they are legally unsound." Pet. Br. 41. That is incorrect. Michigan makes no presumption about how mothers and fathers are supposed to act or interact with their children. But Michigan voters might rationally have agreed with the petitioners' experts that there is a difference between men and women as parents. That presumption is neither irrational nor subject to adjudicative fact-finding. *McCree*, *supra*.

A rational person might think that "men and women are persons of equal dignity and they should count equally before the law" while also thinking that "they are not the same." Tr. of Oral Argument at 15,

*Duren* v. *Missouri*, 439 U.S. 357 (1979) (argument by Ruth Bader Ginsburg). "There are differences between them that most of us value highly. . . . I think that we—perhaps all understand it when we see it and we feel it but it is not that easy to describe, yes, there is a difference." *Id.*

### c. *Michigan's citizens might not have wished to alter a central building block of society before knowing more about its long-term impact.*

The Sixth Circuit also accepted as rational that a state "might wish to wait and see before changing a norm that our society (like all others) has accepted for centuries." Pet. App. 35a. A rational voter might worry about the law of unintended consequences, and might conclude that there is some risk that changing the definition of marriage to remove its inherent connection to procreation might undermine it in the long term as an institution for linking parents to their biological children. A rational person might think, for example, that "[t]he long-term consequences of this change are not now known and are unlikely to be ascertainable for some time to come." *Windsor*, 133 S. Ct. at 2715 (Alito, J., dissenting). "At present, no one—including social scientists, philosophers, and historians—can predict with any certainty what the long-term ramifications of widespread acceptance of same-sex marriage will be." *Id.* at 2716. That is one of the benefits of our federal system: "it permits laboratories of experimentation—accent on the plural—allowing one State to innovate one way, another State another, and a third State to assess the trial and error over time." Pet. App. 35a.

As the Sixth Circuit recognized, "the only thing anyone knows *for sure* about the long-term impact of redefining marriage is that they do not know." Pet. App. 36a. "A Burkean sense of caution does not violate the Fourteenth Amendment, least of all when measured by a timeline less than a dozen years long and when assessed by a system of government designed to foster step-by-step, not sudden winner-take-all, innovations to policy problems." Pet. App. 36a.

Reasonable people of good will might think it is at least debatable that this definition advances Michigan's interest in encouraging parents to stick together to care for and raise their children. And if it is at least debatable, then federal courts have no authority to overturn the people's legislative choice. *Beach Commc'ns*, 508 U.S. at 320 ("The assumptions underlying these rationales may be erroneous, but the very fact that they are 'arguable' is sufficient, on rational-basis review, to 'immuniz[e]' the congressional choice from constitutional challenge.").

### 3. Michigan's marriage laws are focused on the unique capacity of opposite-sex couples to procreate, not animus toward same-sex couples.

The United States does not assert that Michigan's marriage laws are motivated by animus, but the petitioners assert that the "primary purpose" of these laws was to "demean same-sex couples and their families." Pet. Br. 45–49. That argument is wrong and contrary to the district court's fact findings. Pet. App. 133a.

Michigan's longstanding marriage definition is not based in animus toward same-sex couples or individuals who experience same-sex attraction. Every human life has inherent dignity and is of immense worth. Michigan, through its laws, encourages all people to treat each other with respect. Rather, Michigan's marriage definition reflects the state's interest in, and the people's considered view about, the unique capacity of opposite-sex relationships to create children, and the benefits to a child in having a close connection to the biological mother and biological father when possible.

A court cannot infer animus on the part of tens of millions of voters based on isolated statements from proponents of ballot measures or legislation. *Bishop* v. *Smith*, 760 F.3d 1070, 1100 n.6 (10th Cir. 2014) (Holmes, J., concurring). As this Court noted only last Term in another case challenging a Michigan constitutional provision, "[i]t is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds." *Coalition to Defend*, 134 S. Ct. at 1637 (plurality). The Sixth Circuit was exactly right when it concluded that it is just as "unfair to paint the proponents of the [Michigan marriage] measures as a monolithic group of hate-mongers" as it is "to paint the opponents as a monolithic group trying to undo American families." Pet. App. 44.

In his concurrence in the Tenth Circuit's decision in *Bishop*, Judge Holmes concluded that opposite-sex marriage laws do not show the type of animus this Court has found to be sufficient to invalidate a state law. *Bishop*, 760 F.3d at 1105 (Holmes, J., concurring).

For example, Judge Holmes noted that these marriage laws are far from the type of "unprecedented" law this Court invalidated in *Romer* v. *Evans*, 517 U.S. 620, 633 (1996); "they are actually as deeply rooted in precedent as any rule could be." *Bishop*, 760 F.3d at 1105. And, importantly, the conception of marriage as between an opposite-sex couple predated and arose independently of the record of prejudice against gays and lesbians in this country. Pet. App. 51a. These laws are also unlike DOMA, where animus could be inferred from the fact that the federal government "veered sharply" from the usual deference it gave to state marriage laws. *Id.* at 1108.

The petitioners place a great deal of weight on this Court's invalidation of DOMA in *Windsor*, particularly the Court's conclusion that Congress and the President intended through DOMA "to impose a disadvantage, a separate status, and so a stigma" on legally married same-sex couples, and to "interfere[ ]" with "the equal dignity" of same-sex couples. Pet. Br. 47 (quoting *Windsor*, 133 S. Ct. at 2693–94). But the "dignity" of which *Windsor* spoke was not that bestowed by a federal court or even the federal Constitution; it was the dignity bestowed by *the states*, acting through the democratic process. 133 S. Ct. at 2693 ("a dignity conferred by the States in the exercise of their sovereign power"); *id.* ("the congressional purpose [in DOMA § 3 was] to influence or interfere with state sovereign choices about who may be married"); *id.* at 2694 (recognizing that DOMA § 3 affected "state-sanctioned marriages" that "the State has sought to dignify"); *id.* at 2696 ("a status the State finds to be dignified and proper"); *id.* ("those whom the State, by its marriage laws, sought to protect in personhood and

dignity."). The wisdom of *Windsor* is its recognition of the respect due to *the people's* choices about how to define marriage—the very principle that Michigan seeks to vindicate here.

A conclusion that all of Michigan's marriage laws going back to 1805—and indeed, the marriage laws of every state—can be explained solely (or even at all) by animus toward same-sex couples is historically inaccurate and would contradict centuries of this Court's precedents. Such a conclusion would also profoundly change this Court's equal-protection jurisprudence. In *Romer* and *Windsor*, animus was a resultant inference, drawn only after the Court concluded the challenged law served no legitimate interest. See also, e.g., *Lyng* v. *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW*, 485 U.S. 360, 370 n.8 (1988) ("This statement"—that " 'a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate government interest' "—"is merely an application of the usual rational-basis test.").

Because Michigan has a legitimate interest here, there is no animus. Changing the animus inquiry to accommodate the petitioners' claim would inevitably open the door to a multitude of plaintiffs, in a multitude of contexts, claiming, in the petitioners' words, that state laws were enacted "to disadvantage a politically unpopular group." Pet. Br. 46. This Court has never endorsed such an analysis and should not do so here.

### B. Michigan's marriage laws are not subject to heightened scrutiny.

#### 1. Michigan's marriage laws are based on biological complementarity, not sexual orientation.

The petitioners devote only four pages of their 65-page brief to the argument that Michigan's laws discriminate based on sexual orientation. But the United States frames sexual-orientation discrimination as the *only* theory on which the petitioners should prevail. U.S. Br. 2–35. That theory is incorrect for three independent reasons.

1. As noted above, Michigan's definition of marriage grew out of a historical desire to encourage individuals with the inherent capacity to bear children to enter a union that supports child rearing. It had nothing to do with discrimination or animus based on sexual orientation. In other words, "reasons exist to promote the institution of marriage beyond mere disapproval of an excluded group." *Lawrence*, 539 U.S. at 585 (O'Connor, J., concurring).

The whole point of heightened scrutiny is to "smoke out" illegitimate uses of a "suspect tool." *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion). Where, as here, a public policy is not the product of "arbitrary and invidious discrimination" (as was the case with racial discrimination, which the Fourteenth Amendment specifically targeted), there is no need for heightened scrutiny to root out discrimination that does not exist. See *McLaughlin* v. *Florida*, 379 U.S. 184, 191–92 (1964).

2. Next, the circuits have overwhelmingly rejected "sexual orientation" as an obvious, immutable, or distinguishing characteristic that defines a discrete and politically powerless class.[4] As recently as *Windsor*, this Court declined to use "sexual orientation" as the defining characteristic of a suspect class, despite the federal government's invitation to do so. See, *e.g.*, U.S. *Windsor* Br. at 18–36 (arguing that "classifications based on sexual orientation should be subject to heightened scrutiny"). There are numerous reasons why.

As an initial matter, this Court has been reluctant to apply heightened scrutiny to *any* new classification. In the 30-plus years since it recognized illegitimacy as a classification subject to heightened review in *Mills* v. *Habluetzel*, 456 U.S. 91, 99 (1982), the Court has consistently declined to recognize any new classification that warrants heightened scrutiny. And with good reason. Once the Court has designated a suspect class, there is no mechanism to un-designate it, even if circumstances change. And because heightened scrutiny

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[4] *Davis* v. *Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir. 2012); *Cook* v. *Gates*, 528 F.3d 42, 61–62 (1st Cir. 2008); *Price-Cornelison* v. *Brooks*, 524 F.3d 1103, 1113 (10th Cir. 2008); *Citizens for Equal Prot.* v. *Bruning*, 455 F.3d 859, 866–67 (8th Cir. 2006); *Johnson* v. *Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Lofton* v. *Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004); *Thomasson* v. *Perry*, 80 F.3d 915, 927–28 (4th Cir. 1996); *High Tech Gays* v. *Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573–74 (9th Cir. 1990); *Ben-Shalom* v. *Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Woodward* v. *United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989); *Padula* v. *Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987); but see *Latta* v. *Otter*, 771 F.3d 456 (2014); *Windsor* v. *United States*, 699 F.3d 169 (2d Cir. 2012), aff'd on other grounds, 133 S. Ct. 2675 (2013).

applies in both directions, such designations often result in the invalidation of laws that were enacted to benefit the protected class, as has occurred for suspect classes subject to strict scrutiny. See Sonu Bedi, *Collapsing Suspect Class with Suspect Classifications: Why Strict Scrutiny Is Too Strict and Maybe Not Strict Enough*, 47 Ga. L. Rev. 301, 307 (2013) (noting that between 1990 and 2003, the "overwhelming majority" of laws struck based on race classifications were those that sought to ameliorate the status of racial minorities, such as affirmative-action policies).

Moreover, the small set of characteristics this Court has recognized as warranting heightened scrutiny (race, sex, ethnicity, illegitimacy) satisfy all four of the following factors: (1) the class has suffered historical discrimination, *e.g.*, *Bowen* v. *Gilliard*, 483 U.S. 587, 602 (1987); (2) the characteristic has no relation to the person's ability to perform or contribute to society; *Cleburne*, 473 U.S. at 440–41; (3) the state discrimination has used "obvious, immutable, or distinguishing characteristics that define [the members] as a discrete group," *Gilliard*, 483 U.S. at 602; and (4) the class has "a minority or politically powerless" status, *id.* (The federal government says that "political powerlessness" is not necessary, citing the opinion of Justice Marshall concurring in part and dissenting in part in *Cleburne*. U.S. Br. 17 (citing 473 U.S. at 472 n.24). This Court has never agreed, because to do so would place a judicial thumb on the political scale to give aid to a group that has no need of it.) "Sexual orientation" does not satisfy this test.

Consider the factors in reverse order. Political power (factor four) is the factor that most clearly undergirds the need for heightened judicial review. A discrete and insular class that has been subject to historical discrimination for no good reason but now enjoys substantial political power to shape laws has no need for judicial protection. Thus, in *Cleburne*, this Court rejected quasi-suspect status for the mentally disabled because, among other things, "the distinctive legislative response . . . belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary." 473 U.S. at 443. The "legislative response, which could hardly have occurred and survived without public support, negates any claim that the mentally [disabled] are politically powerless in the sense that they have no ability to attract the attention of the lawmakers." *Id.* at 445.

It cannot be disputed that, nationally, gays and lesbians have garnered significant political power and tremendous public support. One *amicus* brief filed in support of the petitioners in the Sixth Circuit estimated that 2.5% of Americans identify as LGBT. Br. of *Amicus Curiae* Gary J. Gates in Support of Pls., *DeBoer* v. *Snyder* (6th Cir. 2014), 7. National polls show support for issuing marriage licenses to same-sex couples at over 50%. The President of the United States now supports the concept and has proposed that the Social Security Administration dispense federal benefits to same-sex partners regardless of state law[5]; the issue is part of the Democratic National Committee

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[5] http://www.bloomberg.com/news/articles/2015-02-02/obama-wants-same-sex-couples-to-have-spousal-benefits (visited March 11, 2015).

platform[6]; and many prominent Republican politicians and hundreds of corporations signed on to *amici* briefs supporting the petitioners. And the best indication is that 11 states—more than 20%—already issue marriage licenses to same-sex couples. Further statistical analyses suggest that all states will legislatively adopt the petitioners' marriage view within 10 years if the political process is left to run its course. Michael J. Klarman, *From the Closet to the Altar: Courts, Backlash, and the Struggle for Same-Sex Marriage*, 193–203 (2013). This is democracy at work.

It is true that the petitioners' desired outcome has not already arrived everywhere. But if "a plaintiff could necessarily win on the political powerlessness factor . . . by the very fact that he was unable to challenge a particular law democratically, the factor would be meaningless." *Sevcik* v. *Sandoval*, 911 F. Supp. 2d 996, 1009 (D. Nev. 2012). Groups that constitute a single-digits percentage of the population will often fail to obtain legislation they desire, despite political power. "The question of 'powerlessness' under an equal protection analysis requires that the group's chances of democratic success be virtually hopeless, not simply that its path to success is difficult or challenging because of democratic forces." *Id.* Factor four weighs strongly against recognition of a suspect classification.

Factor three is also not satisfied, because "sexual orientation" is not a distinguishing *characteristic* that defines a discrete and insular group. According to the American Psychological Association, sexual orientation

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[6] http://www.democrats.org/democratic-national-platform (visited March 11, 2015).

does not refer to a particular "characteristic" at all, but rather to "an enduring pattern of emotional, romantic, and/or sexual attractions to men, women, or both sexes."[7] There is "no consensus among scientists" as to why someone develops a particular orientation, nor a consensus as to whether orientation is determined by "genetic, hormonal, developmental, social, [or] cultural influences."[8] And sexual orientation "ranges along a continuum" and is "defined in terms of relationships with others."[9] While "most people experience little or no sense of choice about their sexual orientation,"[10] nonetheless, sexual orientation is unlike race, ethnicity, sex, or illegitimacy insofar as it is defined by relationships as contrasted with a status or physical identity. These features make sexual orientation profoundly different from any previous characteristic giving rise to a suspect class.

"Sexual orientation," then, does not define a discrete group. And that fact is fatal to a claim for heightened scrutiny. *E.g.*, *Cleburne*, 473 U.S. at 445 (denying protected status to mentally disabled because they are a "large and amorphous class"); *San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 25–28 (1973) (law in question did not discriminate against any "definable category of 'poor' people," but rather against a "large, diverse, and amorphous class").

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[7] American Psychological Association, *Answers to Your Questions For a Better Understanding of Sexual Orientation & Homosexuality*, available at http://www.apa.org/topics/lgbt/orientation.pdf (visited March 8, 2015).

[8] *Id.*

[9] *Id.*

[10] *Id.*

"Sexual orientation" also does not define an insular group. Very different from the nation's history of racial segregation, same-sex couples live among opposite-sex couples as relatives, friends, and neighbors, and opposite-sex couples can see the love and support same-sex couples provide for their children. This is the exact opposite of "insular."

As for factor two of the analysis, it is not possible to say that Michigan's decision to define marriage based on biological complementarity is irrelevant to the state's interest. As explained in § II, *supra*, it is the fact that an opposite-sex couple has the unique capacity to create new life when they engage in sexual conduct that motivated the people's interest in joining this inherent capacity to marriage. A different definition may well be what the democratic process yields, but the Fourteenth Amendment does not require Michigan to define marriage only in one particular way.

The final factor is whether a class has suffered historical discrimination. It is impossible to deny the long history of unfair treatment against same-sex conduct. But that is not what this case is about. The marriage institution developed not out of any attempt to harm gays and lesbians or their children, but to encourage individuals with the inherent capacity to bear children to enter a union that supports raising children, and to remain in that union. (That is one crucial difference between this case and *Lawrence*). The fact that marriage laws have had a disparate impact does not make sexual orientation a suspect class. Cf. *Washington* v. *Davis*, 426 U.S. 229, 242 (1976) ("Disproportionate impact is not irrelevant, but it is not the sole touchstone of" invidious discrimination.).

If the Court were to modify its traditional analysis and designate "sexual orientation" as a protected characteristic, the door would be open to innumerable other groups claiming a need for heightened protection from democratically enacted laws. And as the Court observed in *Cleburne*, "[h]eightened scrutiny inevitably involves substantive judgments about legislative decisions." 473 U.S. at 443. Such judgments result in the federal courts striking down more democratically enacted laws, sometimes based on subjective value judgments; they fundamentally change the constitutional compact the people ratified. The Court should decline the invitation to create a new suspect class.

3. Finally, Michigan's marriage laws do not discriminate based on sexual orientation. (That is why no Michigan official inquires as to a person's sexual orientation before issuing a marriage license.) They do not even classify based on sexual orientation; they classify based on biological complementarity—the creation of new life requires both a mother and a father. Accordingly, no other type of coupling is biologically the same for purposes of an equal-protection analysis. (This Court has never applied a disparate-impact analysis for identifying a protected class. *E.g.*, *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263, 271 (1993) (laws regulating pregnancy and abortion do not qualify as sex discrimination despite near total disparate impact on one sex).) And crucially, Michigan's marriage laws exclude many other combinations of people who raise children, not just same-sex couples. The laws are not a "ban" on these combinations any more than they are a ban on same-sex-couples. The laws are an affirmation of the state's interest in procreative capacity.

It is an opposite-sex couple's capacity to create new life independently that provides Michigan's primary interest in recognizing marriage. And when "individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement" (here, biological complementarity), courts will not "closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued." *Cleburne*, 473 U.S. at 441–42. Defining marriage based on the reality that a man and a woman are required to create new life classifies based on biological complementarity, not sexual orientation.

### 2. Michigan's marriage laws do not discriminate based on sex.

Neither the petitioners here nor the United States argues that Michigan's marriage laws discriminate based on sex. But the petitioners in *Bourke* v. *Beshear* devote a page to the theory, Bourke Br. 38, which requires a brief response.

Discrimination based on sex means that "members of one sex are exposed to disadvantageous terms or conditions . . . to which members of the other sex are not exposed." *Oncale* v. *Sundowner Offshore Servs.*, 523 U.S. 75, 81 (1998). See, *e.g.*, *Reed* v. *Reed*, 404 U.S. 71, 73 (1971) (preference for men over women when administering estates); *Frontiero* v. *Richardson*, 411 U.S. 677, 678–79 (1973) (different burdens for men and women to establish spousal dependency); *Craig* v. *Boren*, 429 U.S. 190, 191–92 (1976) (different drinking ages for men and women); *United States* v. *Virginia*, 518 U.S. 515, 519–20 (1996) (women barred from

military college). Yet it is indisputable that Michigan's marriage laws do not single out men or women as a class. The laws treat the sexes equally, both in terms of relative rights and burdens and in non-stereotyping purpose. Recognizing that both a man and a woman are necessary for marriage reaffirms their equality.

These features distinguish this Court's decision in *Loving*, which was based on Virginia's invidious racial discrimination, which is specifically barred by the Fourteenth Amendment. *Loving*, 338 U.S. at 11–12. Here, the people of the United States have not passed any constitutional amendment whose central meaning is to address the procreative capacity of couples.

*Loving* also involved a dramatically different historical record. State laws that criminalized interracial marriage were generally invalidated or repudiated during Reconstruction on Fourteenth Amendment grounds, and interracial marriages were valid in a clear majority of states in the years after the Amendment's ratification. David R. Upham, *Interracial Marriage and the Original Understanding of the Privileges or Immunities Clause*, 42 Hastings Const. L.Q. 213 (2015). In contrast, marriage did not exist for same-sex couples anywhere in the world until 2000, when the Netherlands allowed it.

Finally, it is not impermissible discrimination for a state to limit marriage to a man and a woman because the state's interest is in making permanent the union between two people with the inherent capacity to create new life, and biology does in fact matter when advancing that interest. This Court has frequently recognized that the government may account for differences in biology between the sexes. *E.g.*, *Michael*

*M.* v. *Superior Court of Sonoma Cnty.*, 450 U.S. 464, 469–73 (1981) ("this Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated"); *United States* v. *Virginia*, 518 U.S. at 533 (sex not a proscribed classification if based on relevant physical differences between men and women); *Nguyen*, 533 U.S. at 73 ("To fail to acknowledge even our most basic biological differences . . . risks making the guarantee of equal protection superficial, and so disserving it."). And Michigan's marriage laws are consistent with these precedents.

Through its laws, Michigan promotes procreation and reinforces the benefit of every child being connected to his or her biological mother and father, maintaining a child-centered view of marriage that increases the likelihood that biological parents stay together even when their emotions fade, and reducing the risk that any child will be born out of wedlock. This interest is based on biological differences.

### 3. Michigan's marriage laws encourage having and raising children within a marriage but do not punish illegitimacy.

The United States raises no argument based on illegitimacy, but the petitioners devote two pages to the proposition. Pet. Br. 54–56. The theory is based on this Court's holdings that " 'a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally.' " *Mills* v. *Habluetzel*, 456 U.S. 91, 97 (1982) (quoting *Gomez* v. *Perez*, 409 U.S. 535, 538 (1973)).

Whether Michigan's marriage laws allow certain adults to marry says nothing about how Michigan law treats the children of unmarried adults. If there is a freestanding claim that the state is treating children differently based on that status, then the children are free to bring that claim and it can be adjudicated on its merits. There is no such claim presented here.

Moreover, the relief for a claim based on the differential treatment of children would be to eliminate the differential treatment of children. The remedy would not be to deem the parents married (how would that work if the parents did not want to get married, or if one of the parents was already married to someone else?). And accepting the petitioners' argument would allow other, non-married couples to bring the same complaint about how the law treats their children. Illegitimacy is not a ground for applying heightened scrutiny to Michigan's marriage laws.

### C. Michigan's marriage laws survive any level of scrutiny.

Michigan's marriage definition satisfies rational-basis review, and heightened scrutiny does not apply. As a result, Michigan need not justify why the marriage definition it has retained since 1805 is over-inclusive or underinclusive nor how redefining marriage may harm the existing marriage institution. But even if this Court were to change one of its constitutional doctrines such that heightened scrutiny was necessary, Michigan's marriage law would still pass muster.

To begin, scholars have analyzed the impact of redefining marriage, and there are numerous social costs and risks associated with doing so. Br. of *Amici Curiae* 109 Scholars of Marriage in Support of Respondents & Affirmance. Chief among these is a further erosion of the paradigm that procreation takes place within marriage, an erosion that will naturally result in more children being raised without the benefit of two parents. *Id.* As noted above, the petitioners confirm that their marriage definition erodes that paradigm. Pet. Br. 62 ("The freedom to marry is entirely separate from an ability or desire to procreate.").

In addition, Michigan's marriage definition is as narrowly tailored as it can be. Michigan cannot exclude infertile couples from its marriage definition without running afoul of the Constitution. And Michigan cannot expand its marriage definition without causing erosion of the procreation paradigm. Accordingly, Michigan's law passes even heightened scrutiny.

* * *

This case is not about the best definition of marriage or any stereotypes about families. Families come in all types, and parents of all types—married or single, gay or straight—love their children. This case is about whether the Fourteenth Amendment imposes a single marriage view on all states such that the people have no right to decide. It does not.

It is difficult to believe that the same Constitution that created the most successful liberal democracy in the history of this world was designed to remove from public debate the fundamental policy decision of

marriage's core purpose and what role it should play in society and government. And it would be stranger still to say that the marriage system that has existed for thousands of years—including when the Constitution and the Fourteenth Amendment were ratified—is actually unconstitutional.

The right to marry a person of one's own sex cannot be a due-process right because it is not firmly based on our nation's history and traditions. And Michigan's marriage definition does not deny the equal protection of the laws to same-sex couples because they are treated the same as many other combinations of people who live together, share lives together, and raise children together.

Instead, Michigan's definition of marriage is based, as the public institution has been for millennia, on the fact that children are born only to opposite-sex couples, and that keeping those couples together affects children's welfare. Perhaps recent social and technological changes have made these facts less important; democratic majorities in some states have so concluded. But these changes affect only the wisdom, not the constitutionality, of the marriage definition. Social policy questions notwithstanding, Michigan's law does not deny anyone due process or equal protection. It is therefore constitutional—particularly if it is a written Constitution we are expounding.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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## APPENDIX A: BALLOT-BOX VOTES ON THE DEFINITION OF MARRIAGE

| State | Year | Votes to maintain marriage definition | Votes to change marriage definition | Resulting law |
|---|---|---|---|---|
| Ala. | 2006 | 697,591 | 161,694 | Ala. Const. art. I, § 36.03 |
| Alaska | 1998 | 152,965 | 71,631 | Alaska Const. art. I, § 25 |
| Ariz. | 2008 | 1,258,355 | 980,753 | Ariz. Const. art. 30, § 1 |
| Ark. | 2004 | 753,770 | 251,914 | Ark. Const. amend. 83, § 1 |
| Cal. | 2008 | 7,001,084 | 6,401,482 | Cal. Const. art. 1, § 7.5 |
| Colo. | 2006 | 855,126 | 699,030 | Colo. Const. art. II, § 31 |

| State | Year | Votes to maintain marriage definition | Votes to change marriage definition | Resulting law |
|---|---|---|---|---|
| Fla. | 2008 | 4,890,883 | 3,008,026 | Fla. Const. art. I, § 27 |
| Ga. | 2004 | 2,454,930 | 768,716 | Ga. Const. art. I, § 4 |
| Haw. | 1998 | 285,384 | 117,827 | Haw. Const. art. I, § 23 (reserving definitional authority to legislature) |
| Idaho | 2006 | 282,386 | 163,384 | Idaho Const. art. III, § 28 |
| Kan. | 2005 | 417,675 | 179,432 | Kan. Const. art. 15, § 16 |
| Ky. | 2004 | 1,222,125 | 417,097 | Ky. Const. § 233A |

| State | Year | Votes to maintain marriage definition | Votes to change marriage definition | Resulting law |
|---|---|---|---|---|
| La. | 2004 | 619,908 | 177,067 | La. Const. art. XII, § 15 |
| Me. | 2012 | 334,723 | 372,887 | Me. Rev. Stat. tit. 19-A, § 650-A (approved by voter referend-um) |
| Md. | 2012 | 1,246,045 | 1,373,504 | Md. Code Ann., Fam. Law § 2-201 & 2-202 (approved by voter referend-um) |
| Mich. | 2004 | 2,698,077 | 1,904,319 | Mich. Const. art. I, § 25 |

| State | Year | Votes to maintain marriage definition | Votes to change marriage definition | Resulting law |
|---|---|---|---|---|
| Minn. | 2012 | 1,399,916 | 1,510,434 | None (amend-ment to maintain marriage definition defeated) |
| Miss. | 2004 | 957,104 | 155,648 | Miss. Const. art. 14, § 263A |
| Mo. | 2004 | 1,055,771 | 439,529 | Mo. Const. art. I, § 33 |
| Mont. | 2004 | 295,070 | 148,263 | Mont. Const. art. XIII, § 7 |
| Neb. | 2000 | 477,571 | 203,667 | Neb. Const. art. I, § 29 |
| Nev. | 2002 | 337,197 | 164,573 | Nev. Const. art. I, § 21 |

| State | Year | Votes to maintain marriage definition | Votes to change marriage definition | Resulting law |
|---|---|---|---|---|
| N.C. | 2012 | 1,317,178 | 840,802 | N.C. Const. art. XIV, § 6 |
| N.D. | 2004 | 223,572 | 81,716 | N.D. Const. art. XI, § 28 |
| Ohio | 2004 | 3,329,335 | 2,065,462 | Ohio Const. art. XV, § 11 |
| Okla. | 2004 | 1,075,216 | 347,303 | Okla. Const. art. II, § 35 |
| Or. | 2004 | 1,028,546 | 787,556 | Or. Const. art. XV, § 5a |
| S.C. | 2006 | 829,360 | 234,316 | S.C. Const. art. XVII, § 15 |

| State | Year | Votes to maintain marriage definition | Votes to change marriage definition | Resulting law |
|---|---|---|---|---|
| S.D. | 2006 | 172,305 | 160,152 | S.D. Const. art. XXI, § 9 |
| Tenn. | 2006 | 1,419,434 | 327,536 | Tenn. Const. art. XI, § 18 |
| Tex. | 2005 | 1,723,782 | 536,913 | Tex. Const. art. 1, § 32 |
| Utah | 2004 | 593,297 | 307,488 | Utah Const. art. I, § 29 |
| Va. | 2006 | 1,328,537 | 999,687 | Va. Const. Art. I, § 15-A |

| State | Year | Votes to maintain marriage definition | Votes to change marriage definition | Resulting law |
|---|---|---|---|---|
| Wash. | 2012 | 1,431,285 | 1,659,915 | Wash. Rev. Code Ann. § 26.04.010 (approved by voter referend-um) |
| Wis. | 2006 | 1,264,310 | 862,924 | Wis. Const. art. XIII, § 13 |
| Total votes by position | | 45,429,813 | 28,882,647 | |
| Total overall votes | | 74,312,460 | | |

## APPENDIX B: LEGISLATIVE ACTION ON THE DEFINITION OF MARRIAGE IN STATES THAT DID NOT HAVE A STATE-WIDE VOTE

| State | Year | Statute |
|---|---|---|
| Conn. | 2009 | Conn. Gen. Stat. Ann. § 46b-20 |
| Del. | 2013 | Del. Code Ann. tit. 13, § 101 |
| Ill. | 2014 | 750 Ill. Comp. Stat. Ann. 5/201 |
| Ind. | 1997 | Ind. Code Ann. § 31-11-1-1 |
| Iowa | 1998 | Iowa Code Ann. § 595.2 |
| Mass. | 2005 | No recent statute on issue, but legislative activity[11] |
| N.H. | 2010 | N.H. Rev. Stat. Ann. § 457:1-a |
| N.J. | 2012 | Bill vetoed[12] |
| N.M. | 2014 | No affirmative statute on issue, but legislative activity[13] |
| N.Y. | 2011 | N.Y. Dom. Rel. Law § 10-a |
| Pa. | 1996 | 23 Pa. Cons. Stat. Ann. § 1704 |

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[11] http://www.nytimes.com/2005/09/15/national/15amendment.html?_r=0.

[12] http://www.nytimes.com/2012/02/18/nyregion/christie-vetoes-gay-marriage-bill.html?_r=0.

[13] http://www.freedomtomarry.org/blog/entry/with-end-to-new-mexico-legislative-session-the-freedom-to-marry-stands-once/.

| | | |
|---|---|---|
| R.I. | 2013 | R.I. Gen. Laws Ann. § 15-1-1 |
| Vt. | 2009 | Vt. Stat. Ann. tit. 15, § 8 |
| W. Va. | 2001 | W. Va. Code Ann. § 48-2-104 |
| Wyo. | 1977, 2011 | Wyo. Stat. Ann. § 20-1-101 |